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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 241

W. W. WATTS, *Petitioner*,

v.

THE UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Fifth Circuit,

AND BRIEF IN SUPPORT THEREOF

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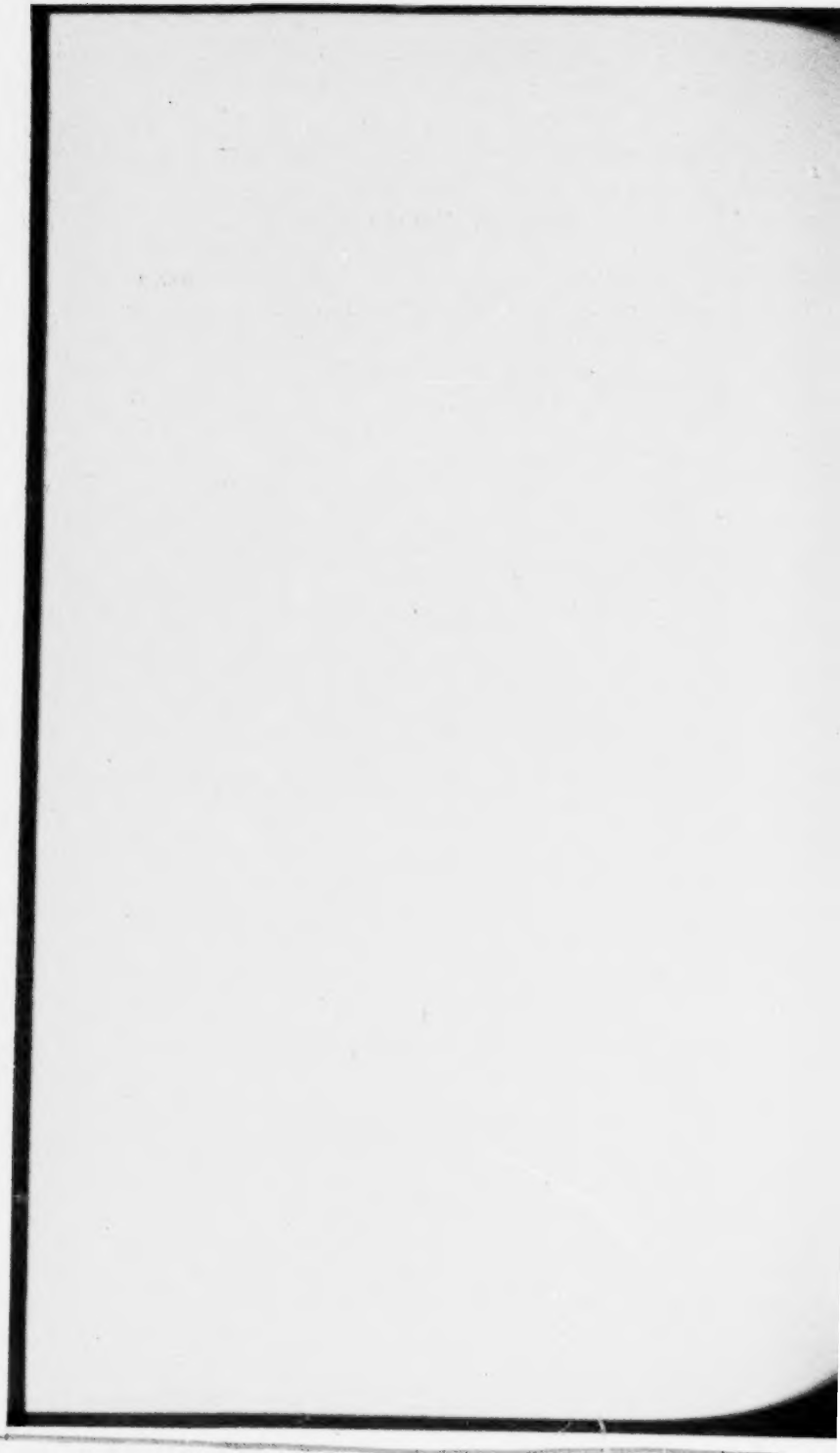

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IN THE

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OCTOBER TERM, 1947

No._____

W. W. WATTS, *Petitioner,*

v.

THE UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Fifth Circuit

---

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, W. W. Watts, respectfully prays for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, to review a Judgment of that Court entered on May 13th, 1947, convicting Petitioner of a violation of Sec. 924, et seq., Title 50-App. U. S. C. A. and Maximum Price Regulation 540, as amended.

A Petition for Rehearing was denied on June 13th, 1947.

Summary Statement of Matter Involved

Petitioner was indicted in four counts alleging that he violated the Emergency Price Control Act of 1942 as amended, and the Price Control Extension Act of 1946 (R. 3-5).

ON OCTOBER 7TH, 1946, Petitioner moved to dismiss the Indictment because it was fatal. This Motion was sustained (R. 6-9). One day after the Motion to Dismiss was sustained—on *October 9, 1946*—a Criminal Information was filed setting up the same allegations as in the dismissed Indictment. The same day the Criminal Information was served upon Petitioner *(October 9th, 1946)* he presented his Motion to Postpone Arraignment for a period not to exceed ten (10) days from *October 9th, 1946*. This Motion was promptly overruled. Thereupon, Petitioner filed a Motion for Bill of Particulars, seeking to have the Government allege the price charged by Petitioner in the sale of the automobiles. This was likewise overruled. Petitioner then filed a Motion to Dismiss the Criminal Information on the ground that no offense was charged therein because the statute under which prosecution was sought expired and became inoperative on June 30th, 1946. This Motion was overruled. Petitioner then filed a Motion to File Application in the Court of Emergency Appeals to enable him to raise the question of the constitutionality of said Act. (*Sec. 924, Par. (D), U. S. C. A., Title 50 App.*). This Motion was overruled and Petitioner ordered to an immediate trial in this cause (R. 12-21).

to an immediate trial in this cause (R. 12-21).

In disposing of these several Motions and in ordering Petitioner to immediate trial, the Trial Court consumed a period of *thirty-four minutes*, that is, from *1:38 p. m. to 2:12 p. m., the same day* (R. 12, 14, 16, 19, 48).

Trial was before a Jury. At the conclusion of the Gov-

ernment's testimony, Petitioner moved for a verdict of acquittal, which was denied (R. 205-207, 210). The same Motion was renewed by Petitioner at the conclusion of all of the testimony and was again refused (R. 224, 243).

Appellant did not take the stand. Prior to the submission of the case to the jury, the Trial Judge gave the following charge to the jury:

"THE COURT:

Gentlemen of the Jury, at this time, at the conclusion of the argument of counsel, which is at the conclusion of the introduction of the testimony, it becomes my duty to charge you on the law applicable to the facts that you have heard detailed before you in the trial of this case.

The defendant, W. W. Watts, stands charged by criminal information in three counts with, in the first instance, having on or about the 17th day of April, in 1946, here in Harris County, Texas, that he did wilfully, or did unlawfully and wilfully, sell and deliver to David Brennan a 1941 Ford automobile, and that he sold to said David Brennan this car at a price higher than the maximum price permitted by the regulations of the Emergency Price Control Act.

That the second count alleges that the same defendant did, on or about the 5th of August, 1946, in Harris County, in the Houston Division of the Southern District of Texas, did unlawfully and wilfully sell and deliver to C. T. Jackson, Jr., a 1939 Chevrolet town automobile at a price in excess of and in violation of Maximum Price Regulation 540, said price being over the ceiling price permitted to be charged by the Emergency Price Control Act.

And then in the third count, the charge is that the same defendant, on the 10th day of August, 1946, in Harris County, Houston Division of the Southern District of Texas, did unlawfully and wilfully sell and deliver to W. L. Lybarger a 1941 Pontiac four-door auto-

mobile at a price in violation of and in excess of Maximum Price Regulation 540.

Now, the fourth count, gentlemen, is eliminated from your consideration, and I have written "Dismissed," and have drawn a cross through it, so you are not even to read that. When I submit it to you, I may even turn it under, so that it won't be considered.

Gentlemen of the Jury, an indictment, or, in this case, a criminal information, is merely a formal accusation. It is not in itself proof of anything. The proof must come in a legal manner, and by, as is the case here, the defendant's entering a plea of not guilty, thereby the burden falls upon the prosecution, the Government, to prove guilt, or his guilt, beyond a reasonable doubt.

Now, in every criminal case, as I have stated before to some of you, the presumption of innocence obtains, and it so remains until discharged by the prosecution proving guilt by competent evidence beyond a reasonable doubt.

By the term "reasonable doubt" is meant a doubt that grows reasonably out of the evidence or lack of it. It is not a captious or fanciful doubt. It is not a doubt that you might conjure up without any basis or foundation in fact. It is not a doubt that grows out of sympathy for the unfortunate position of the defendant, nor is it a doubt that grows out of a dislike to accept responsibility of convicting a fellowman. The test about the matter is simply this: If, after careful comparison and consideration of the evidence submitted you can candidly say that you are not convinced of the defendant's guilt, then you have a reasonable doubt, and you should give the defendant the benefit of it, but on the other hand, if after considering the evidence of both sides, you can honestly say that you have an abiding conviction of the defendant's guilt of such character that you would be willing to act upon that conviction in the more important and weighty affairs of your own lives, then you have no reasonable doubt and you should convict.

Proof beyond a reasonable doubt does not mean proof beyond all possibility of a mistake.

In that same connection, Gentlemen, this rule of reasonable doubt applied to every material element of the offense charged.

Now, in the analysis of the offense charged, there are perhaps, briefly analysed, three things that you must find beyond a reasonable doubt in order to find the defendant guilty on any or on each, as the case may be, of the counts submitted to you for your consideration, to-wit: Counts one, two and three.

The first is, do you find beyond a reasonable doubt that the defendant, W. W. Watts, did sell the automobile in question.

And, secondly, if you find that he did sell it, do you find beyond a reasonable doubt that he sold it at a price over the ceiling price.

And thirdly, do you find beyond a reasonable doubt that he sold it over the ceiling price wilfully.

Now, that would call upon me to discuss with you what several terms mean.

By the term "sell," of course, is simply meant to transfer title and possession. It means to pass or transfer title and possession to the particular automobile in question.

Now, then, on the question of whether Mr. Watts did the things that he is accused of, and which you are trying him for, in part, is upon what is known in law as circumstantial evidence. I think that is particularly true with reference to count number one. To justify a verdict of guilty based entirely upon circumstantial evidence, the facts must not only be consistent with the guilt of the defendant, but they must be inconsistent with any other reasonable hypothesis that can be predicated upon the evidence.

You are charged that whosoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal. In other words, anyone who participates in any crime in any of

the manners that I have just described to you is, under Title 18, Section 550 of the United States Code, which is the laws of the United States, guilty as a principal.

Gentlemen, in considering this case, I would suggest that you take up each of the counts, analyze each one along the lines and in view of the principles that I have given you, and then determine what the facts are, because, truly, gentlemen, you are the exclusive judges of the facts proved, of the credibility of the witnesses and of the weight to be given to their testimony.

This simply means that it is exclusively and solely your function, and task, and duty to determine what the true facts are in this case, and in so doing you can accept or reject the whole or any part of any of the testimony submitted to you for your consideration.

In finding a verdict of guilty, if you should, which is solely up to you, then the question of punishment is one solely up to the Court, and not to the jury—as to what the punishment should be, that is.

The form of verdict I have prepared for your convenience:

"We, the jury, find the defendant W. W. Watts, on count number one," and then there is a place for you to write your verdict, and then "Count number 2", and "Count number 3", and a blank space for you to write in either "guilty" or "not guilty", as the case may be, and a place to be signed by your foreman, whom you will select from among your number.

It is, of course, necessary for you to agree unanimously—that is, all twelve of you—on any count to find a true verdict on that particular count, and each of the counts.

You are charged with reference to the word "wilful" as used in this charge, and when I say charge in this instance, I mean the criminal information,—the word "wilful" as used, means that which is intentional, or knowing, or voluntary, as distinguished from accidental. In other words, it is something knowingly done, or intentionally done, or voluntarily done.

Gentlemen, in this case the defendant has not gone upon the witness stand. Under the laws of the United States, no presumption arises by reason of his failure to testify, because it does not create any presumption against him." (R. 244-248.)[1]

Petitioner did not except to this charge because he contended throughout that the issue of *"good faith" (Sec. 925 (D), 50 U. S. C. App.)*, should have been submitted to the Jury, whether requested or not, as well as the definition of *"used cars"* as set forth in Maximum Price Regulation 540; that before the Jury could legally convict Petitioner they would have to find that he acted with an evil purpose, and in reaching such a conclusion the Jury would be entitled to consider all circumstances attendant in arriving at the existence of, or lack of, "good faith." THAT TO CONVICT ON ANY OTHER BASIS WOULD BE TO SET UP A STANDARD CONTRARY TO WHAT CONGRESS HAS PRESCRIBED AS THE SOLE BASIS OF DETERMINING GUILT. MOREOVER, PETITIONER TOOK THE POSITION IN THE COURTS BELOW, AS HE DOES HERE, THAT THE ACT AND THE REGULATION UNDER WHICH HE WAS CHARGED, WAS UNCONSTITUTIONAL AND THE DETERMINATION OF THIS POINT WAS SOUGHT BY AN APPROPRIATE PROCEEDING IN THE EMERGENCY COURT OF APPEALS.

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[1] The defects in the alleged " * * * instructions * * * " were " * * * not cured when the judge gave the usual general charges as to presumption of innocence, burden of proof and reasonable doubt:" and the several definitions, " * * * in the absence of a specific charge as to * * * " the presence of *"good faith"* as well as the other essential facts constituting the crime charged since " * * * such general charges were insufficient." This is so, "Because there is altogether too much danger that the jury may not have understood that such * * * " *good faith* * * * was an essential element of guilt, we conclude that the verdict cannot stand." (JUSTICE FRANK in U. S. v. AUSMEIER,—2 Cir.—152 F. (2d) 349, 358.)

Petitioner's position was, and is, in the circumstances of this case, that he was denied Due Process of law and that the fundamental fairness essential to American concept of justice was absent from these proceedings, and that such absence of fairness infected the entire trial to the extent that he was deprived of substantial rights as well as the substance of a fair trial.

Petitioner's further contention was that the charge to the jury told them nothing because it contained only general instructions and stereotyped definitions, and, particularly failed to give the jury any information concerning the law governing the violations they were to consider. MOREOVER, THE PROOF OFFERED COVERED MOTOR VEHICLES OTHER THAN THOSE MENTIONED IN THE INFORMATION, HENCE, NO CASE HAD BEEN MADE OUT BY THE GOVERNMENT.

In this connection, we desire to call attention to the opinion by JUDGE MCCORD (R. 259), lines five to eight:

> "AS TO COUNT TWO, THE RECORD EVIDENCE SHOWS THAT ON AUGUST 5, 1946, WATTS SOLD TO C. T. JACKSON *A 1939 MODEL CHEVROLET TUDOR TOWN SEDAN* FROM A USED CAR LOT IN HOUSTON, HARRIS COUNTY, TEXAS."

The Information (Second Count) alleges

> " * * * A 1939 CHEVROLET TOWN AUTOMOBILE, * * * " (R. 10).

JUDGE MCCORD's opinion (R. 259), lines twenty to twenty-two states:

> "ON THE 3RD COUNT, THE EVIDENCE SHOWS THAT WATTS SOLD TO W. L. LYBAR-

GER *A 1940 MODEL PONTIAC 6-CYLINDER, 4-DOOR DELUXE AUTOMOBILE* * * * ."

The Information (R. 10) recites:

" * * * A 1940 PONTIAC 4-DOOR AUTOMOBILE, * * * "

The Jury found Petitioner *guilty* on the Second and Third Counts, *not guilty* on the First Count (R. 22-23); the Government dismissed the Fourth Count (R. 43). He was sentenced to one year on each Count, and fined $1,000.00 on each Count (R. 24-26). The Trial Court set bail bond in the sum of *$3,000.00.*

In his Motion for a New Trial (R. 27-29), Petitioner sought to focus the Trial Court's attention to the contentions raised in the Court below, and which are reurged here. This Motion was presented and *immediately* overruled.

The Court below ruled (R. 259):

" * * * that the charge of the (Trial) Court is brief and not as detailed or explanatory as might have been desirable, * * * "

nevertheless, JUDGE MCCORD held that Rule 30, NEW FEDERAL RULES OF CRIMINAL PROCEDURE superseded and took precedence over the several recent cases of this Court and the numerous Circuit Court decisions,[2] and pitched the decision on his interpretation of the Rule.

The position that the Trial Court should have withheld all issues from the Jury and the Indictment dismissed because the statute was unconstitutional was brushed aside by the Court below with no comment. The alternative argument of Petitioner that the Trial Judge should have pointed

[2] cf. cases cited under Reasons Relied on for Allowance of the Writ," pp. 13, et seq.

out the essentials to be proved in order to properly convict was likewise cast aside.

All of the contentions raised by this Petitioner present important and substantial questions of law.

Jurisdiction

I.

The Jurisdiction of this Court is under § 240(a) of the JUDICIAL CODE, 28 U.S.C.A., § 347(a).

The Federal Statute involved is the Emergency Price Control Act of 1942 as amended, and the Price Control Extension Act of 1946, and Maximum Price Regulation No. 540 as amended (9 FED. REGISTER 6434).

Pertinent to this appeal are the following excerpts from said statute and said Maximum Price Regulation:

> "No person shall be held liable for * * * penalties in any Federal * * * court * * * in respect of anything done or omitted to be done in good faith pursuant to any provision of * * * any regulation * * * of the Administrator of the Office of Price Administration * * *." (50 U. S. C. Appendix, § 925(d).)
>
> "Definition of used passenger automobile ("used car"). "Used passenger automobile" (called "used car" in this regulation) means any passenger automobile having a seating capacity of less than eleven persons which has been driven 1,000 miles or more, and the chasis or body of such an automobile. This definition includes, among others, used taxicabs and station wagons having a seating capacity of less than eleven persons." (§ 1, MAXIMUM PRICE REGULATION No. 540).

II.

Under that part of the Fifth Amendment to the United States Constitution which in so far as applicable provides

"that no person shall * * * be deprived of * * * liberty * * * without due process of law."

Questions Presented

Whether a conviction for violation of a Federal Statute, to-wit: Emergency Price Control Act of 1942 as amended, and the Price Control Extension Act of 1946, and Maximum Price Regulation No. 540 as amended, shall be permitted to stand when:

A.

The issue as to whether Petitioner violated the Federal Statute and Maximum Price Regulation No. 540, absent "good faith," was *not* submitted to the jury.

B.

The Trial Court failed to instruct the jury in this cause in accordance with the standards prescribed by Congress, particularly, with reference to the presence or absence of "good faith."

C.

The Trial Judge failed to instruct the jury as to the relevant Federal statute and Regulation of which Petitioner stood charged, in violation of the 5th Amendment of the United States Constitution.

D.

The proceedings in the Trial Court were so embalmed and infected with an atmosphere of hostility as to deny Petitioner the essentials of American Justice and of the substance of a fair trial, in violation of the 5th Amendment of the United States Constitution.

E.

The Information charged no violation of the law, in

that the Statute and Regulation invoked and alleged to have been violated by Petitioner had expired by operation of law and was therefore nonexistent.

F.

This conviction is not sustained by the Record evidence.

G.

There is no legal proof that Petitioner sold the specific automobiles mentioned in the Criminal Information; in fact, the opinion of the Court below (R. 259) specifically points out that "the record evidence" shows sales of automobiles other and different from those with which Petitioner was charged with selling (R. 10).

H.

The circumstantial evidence did not exclude every reasonable hypothesis of innocence.

Statute and Regulation Involved

Section 925(d), 50 U. S. C. Appendix, relevant to this proceeding, provides:

> "No person shall be held liable for * * * penalties in any Federal * * * court * * * in respect of anything done or omitted to be done in good faith pursuant to any provision of * * * any regulation * * * of the Administrator of the Office of Price Administration * * *."

Section 1, MAXIMUM PRICE REGULATION No. 540, pertinent to this cause, declares:

> "Definition of used passenger automobile ("used car"). "Used passenger automobile" (called "used car" in this regulation) means any passenger automobile having a seating capacity of less than eleven persons which

has been driven *1,000 miles or more,* and the chasis or body of such an automobile. This definition includes, among others, used taxicabs and station wagons having a seating capacity of less than eleven persons."

Rule 30, NEW FEDERAL RULES OF CRIMINAL PROCEDURE follows: (THE COURT BELOW HOLDS THAT THIS NEW RULE FORFEITS PETITIONER'S RIGHT TO HAVE THE JURY *LEGALLY* INSTRUCTED.)

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The Court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury." (FEDERAL RULES OF CRIMINAL PROCEDURE—New York University School of Law—1946, pp. 51-52.)

Reasons Relied on For the Allowance of the Writ

I.

The decision of the Court below is contrary to and in direct conflict with the decisions of this Court in SCREWS v. UNITED STATES (May, 1945), 325 U.S. 91; UNITED STATES v. BALLARD, ET AL. (April, 1944), 322 U.S. 78; BOLLENBACH v. UNITED STATES (Jan., 1946), 326 U.S. 607; THE

UNITED BROTHERHOOD, ETC., v. UNITED STATES (March, 1947), 67 S. Ct. 775, in which cases this Honorable Court has laid down the principle that where an issue such as "good faith" is a constituent element of the crime, that issue *must* be submitted to the jury under appropriate instructions, whether requested or not, since the Constitutional right to a jury trial is fundamental. Further, that even where no exception is taken by a defendant to the failure of the Trial Judge to so instruct the jury, such failure constitutes *fundamental error* because every defendant is entitled to a fair trial *and is entitled to be tried by the standards of guilt which Congress has promulgated.*

The Court below in disposing of this cause ruled that, although the entire record establishes that the Trial Court, at no time, informed the Jury as to what they must find as fact before a verdict could be returned against Petitioner; that the jury was *not* given any hint of the applicable law, *none* of the elements of the substantive crime stated or explained to the jury and the provisions of Maximum Price Regulation No. 540 was *not* offered in evidence nor otherwise disclosed to them, Rule 30, precluded Petitioner from the right to a jury trial.

Thus, it would appear that the decision of the Court below has created a conflict on an important federal question which this Court alone can compose.

Either the cases decided by this Court are controlling or the Judgment of the Court below is erroneous, or the recent enactment of Rule 30, NEW FEDERAL RULES OF CRIMINAL PROCEDURE, is a question which has not been determined by this Court. Because of the importance of this question and, particularly, because Rule 30, NEW RULES OF CRIMINAL PROCEDURE, has not heretofore been considered by this Court, and because the interpretation given to Rule 30, by the Court below will affect the constitutional right to a jury trial of

every defendant charged with a Federal offense in the United States Courts, it is thought that the Writ should issue to the end that there may be an authoritative and elucidative decision upon the question here presented.

The decision of the Court below leaves in confusion the proper rule to be applied in the conduct of a Criminal Proceeding where the Trial Judge, as here, fails to instruct the jury on the statutory ingredients of the crime, and a decision by this Honorable Court seems necessary to determine the scope of Rule 30, to the end that the administration of Criminal Procedure as affecting a defendant's right to a jury trial in the United States District Courts will be settled and made uniform.

II.

The decision of the Court below is also in conflict with the decisions of the various Circuit Courts of Appeals, as follows:

Cave v. U. S., 8 Cir. (Feb., 1947), 159 F. (2d) 464 (attempts to construe Rule 30);
United States v. Pincourt, et al., 3 Cir. (Jan., 1947), 159 F.(2d) 917;
United States v. Noble, 3 Cir. (May, 1946), 155 F. (2d) 315;
United States v. Max, 3 Cir. (May, 1946), 156 F. (2d) 13;
United States v. Levy, 3 Cir. (Feb., 1946), 153 F. (2d) 995;
Sandroff v. United States, 6 Cir. (Dec., 1946), 158 F. (2d) 623;
Schmeller v. United States, 6 Cir. (June, 1944), 143 F. (2d) 544;
Morris v. United States, 9 Cir. (June, 1946), 156 F. (2d) 525;
Corson v. United States, 9 Cir. (Dec., 1944), 147 F. (2d) 437;

Williams v. United States, Ct. of App., D.C. (Oct., 1942), 131 F. (2d) 21.

All of these cases, except the SCHMELLER and WILLIAMS cases, are directly in point with the issues raised by Petitioner in the Court below.

WHEREFORE, it is respectfully prayed that a writ of certiorari be issued out of the seal of this Court directed to the United States Circuit Court of Appeals for the Fifth Circuit commanding that Court to certify and send to this Court for its review and determination the full and complete transcript of the record and all proceedings in the case at bar, and it further prayed that the order of the said Circuit Court of Appeals for the Fifth Circuit affirming the Southern District of Texas (Houston Division) be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as this Honorable Court may deem just and proper, and your petitioner will ever pray.

July 31st, 1947. W. W. WATTS, *Petitioner*,

By_____

BERNARD A. GOLDING,
432 Niels Esperson Bldg.,
Houston, Texas,
Counsel for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No._____

W. W. WATTS, *Petitioner*,

v.

THE UNITED STATES OF AMERICA, *Respondent*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of the Court Below

The opinion of the Court below is reported in 161 F. (2d) 511. It also appears in the Record on pp. 256-261. This opinion was rendered on May 13th, 1947, and Petition for Rehearing, timely filed, was overruled on June 13th, 1947. Motion to Stay Mandate for purpose of applying for Writ of Certiorari was duly filed, and Motion *to extend time* in which to make application for Writ of Certiorari on account of illness of Petitioner's counsel *was allowed* by MR. JUSTICE BLACK *and Petitioner given until August 6th, 1947,* in which to apply for this Writ (R. 266).

Statement of the Case

A rather complete statement has already been made in the petition (on pp. 2-10), which Petitioner adopts and makes a part of this Brief.

Specifications of Error

The Circuit Court of Appeals Erred:

I.

In holding that the Trial Court submitted all of the "crucial" Issues to the Jury and that the Jury was fully informed as to the relevant Federal Statute and Regulation of which Petitioner stood charged.

II.

In not holding that since the Jury was not advised that Petitioner could *not* be found guilty unless they found as fact that what he did was not done in "good faith," thus, depriving Petitioner of his Constitutional right to trial by Jury.

III.

In failing to hold that the duty of maintaining the Constitutional right of a Jury Trial rises above mere rules of procedure, to-wit: Rule 30, New Rules of Criminal Procedure.

IV.

In failing to hold that the Trial Court abused judicial discretion in overruling the Motions filed by Petitioner.

V.

In holding that Petitioner was not denied due process of law and that the Constitutional right to Jury Trial was not denied Petitioner, even though the Trial Court failed to charge the Jury on each and all of the statutory ingredients constituting the crime with which Petitioner was charged.

VI.

In failing to hold that the proceedings in the Court below were so embalmed and infected with an atmosphere of hostility as to deny Petitioner due process of law, and the substance of a fair trial.

VII.

In holding that the evidence in this cause was sufficient, notwithstanding, there was no proof that Petitioner, or anyone else, sold the motor vehicles described in the criminal information.

VIII.

In failing to hold that the evidence in this case demonstrated beyond a reasonable doubt petitioner's "guilt" under the Second and Third Counts of this Criminal Information.

POINT I

The charge of the Court manifestly deprived Petitioner of the Constitutional right to a Jury Trial and of the substance of a fair trial.

Argument

The Statute and Regulation of which Petitioner stood charged requires that it be established as fact that Petitioner in doing what was claimed failed to exercise "good faith" (50 U. S. C. A. App., §925 (d)) and that the motor vehicle had a seating capacity of less than eleven persons and had been driven " * * * 1000 miles or more," (§1, Maximum Price Regulation 540). These matters constituted "crucial" issues in the determination of guilt or innocence.

In the preliminary statement to the jury the Trial Court states: (R. 244) " * * * it becomes my duty to charge you on the law applicable to the facts that you have heard detailed before you in the Trial of this case." The Trial Court was correct in that it was his "*duty*" to charge the jury. But instead of performing this *duty*, he misdirected them (NUDD v. BURROWS, 91 U.S. 426, 439; dissenting opinion of MR. JUSTICE FRANKFURTER in FISHER v. U. S., 328 U.S. 463, 477, et seq.) in that he did *not* even mention "good faith" and the other "crucial" items to the jury.

Since these matters constituted basic issues and principles, it was the *duty* of the Court to properly charge the jury. A jury is not properly charged on such basic issues and principles by equivocal language or by mere implication (BIRD v. U. S., 180 U.S. 357; HERSH v. U. S., 68 F. (2d) 799). And "* * * a failure to charge correctly is not harmless." (UNITED BROTHERHOOD, ETC., v. U. S., 67 S. Ct. 755, 782-783.)

For the jury to determine whether Petitioner was guilty of the crimes charged, it was necessary for them to be instructed by the Court on all of the basic issues constituting the essential elements of the crimes. Otherwise it was impossible, no matter how clear the evidence, to determine whether Petitioner acted innocently or in bad faith and whether the motor vehicles came within the purview of §1, Regulation 540.

The Maximum Price Regulation 540, was *not* put in evidence. The Statute, §924, et seq., 50 U. S. C. App. was *not put* in evidence. Neither did the instructions explain the elements of the substantive offenses which were to be found by the jury before *legal* conviction could obtain.

The only instructions by the Court were the usual general charges as to presumption of innocence, burden of proof and reasonable doubt; as well as a few stereotyped definitions.

The result was to take from the jury entirely the question of whether Petitioner acted in "good faith" and the issue whether the motor vehicles were "used cars" or new vehicles. These were essential elements of the substantive offense. But under the instructions of the Court as given (R. 244-248) the jury could not possibly have considered issues of "good faith" and the type of automobiles. Moreover, the Trial Court did *not* even advise the jury once in the entire charge that if they believed from the evidence that Petitioner was innocent, or if they believed that the Government had not proved every element of the crime charged beyond a reasonable doubt, they must return a verdict of *not* guilty (WILLIAMS v. U. S., 131 F. (2d) 21, 22).

The charge as given by the Trial Court is reversible error. As stated in BOLLENBACH v. U. S., 327 U. S. 608, 612:

> " 'The influence of the trial judge on the jury is necessarily and properly of great weight,' Starr v. United States, 153 U.S. 614, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge. * * * Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria."

No standard by which the jury could measure the facts was afforded by the Court's entire charge to the jury.

The jury was given no hint of the law, or of the elements of the substantive crime that it must find as fact before a legal verdict could be returned against Petitioner. The entire charge, like that in WILLIAMS v. U. S., 131 F. (2d) 21 (App. D.C. 1942), assumes that the jury knew all of the circumstances under which a verdict of GUILTY was proper and under which a verdict of NOT GUILTY was proper. As that Court held (p. 23):

> "Such an assumption violates the accepted division of functions between judge and jury. It is almost, if not, as important to a defendant to have a jury instructed on the law applicable to his particular case by the judge who knows the law, as to have a jury of his peers. The latter is supposed to safeguard our institutions of fair trial by insuring impartiality. But of what value is an open mind, if it does not know, with clear delineation, the issues upon which it is to pass judgment?"

The duty of the Trial Court to give to the jury a definition of the crime and the elements thereof is well established (U. S. v. DEWINSKY, 41 F. Supp. 149; SPARF v. U. S., 156 U. S. 51; BIRD v. U. S., 180 U.S. 356; SCREWS v. U. S., 325 U. S. 91; BOLLENBACH v. U. S., 326 U.S. 607; THE UNITED BROTHERHOOD, ETC., 67 S. Ct. 775). This holds true, irrespective of whether or not the Trial Court is requested to instruct the jury (U. S. v. PINCOURT, 3 Cir., 159 F. (2d) 917; U. S. v. NOBLE, 3 Cir., 155 F. (2d) 315; SANDROFF v. U. S., 6 Cir., 158 F. (2d) 623, and MORRIS v. U. S., 9 Cir., 156 F. (2d) 525). As stated by former CHIEF JUSTICE HUGHES in BROWN v. STATE OF MISSISSIPPI, 297 U.S. 278, 287:

> " * * * The duty of maintaining Constitutional rights

> of a person on trial * * * rises above mere rules of procedure, and wherever the Court is clearly satisfied that such violations exist, it will refuse to sanction such violations and will apply the corrective."

It should be noted that examination of the records and the briefs in the Circuit Court cases (all of them are O.P.A violations) cited herein, except the SCHMELLER and WILLIAMS cases, supra, disclose that the Defendant in each of said cases requested no instructions and took no exceptions on this ground to the instructions given. Nevertheless, because it was obvious, as it is here, that such instructions left the decision in each of these cases, to the mere whim and caprice of the jury, the Court in each instance recognized the eminent necessity of reversal.

The verdict here was necessarily based on nothing more than guess or conjecture by the jury as to what the applicable law was. It is without support in law or reason.

The jury through the confusion of the Trial Court and the inadequacy of the instructions was left free to speculate as to whether the motor vehicles sold were "used cars" and as to whether Petitioner acted in "good faith." A verdict based on so erroneous a hypothesis and so plainly based on speculation by the jury cannot be sustained. "A conviction ought not to rest upon an equivocal direction to the jury on a basic issue" (BOLLENBACH v. U. S., 326 U.S. 607, 613).

Whether Petitioner acted in "good faith," and whether the motor vehicles had been driven "a thousand miles or more" were vital issues for the jury to determine by consideration of the facts under appropriate instructions as to the law. If error in failure to submit such "crucial" issues to the jury may be cured by the Government arrogating to itself the jury's function and determining for itself as an ultimate fact "Petitioner did not act in good faith," then the constitu-

tional right to jury trial is in grave peril (TUMEY v. OHIO, 273 U.S. 510, 535).

Clearly, Petitioner was entitled to have the basic issues and principles stated herein fairly presented to the jury and not decided by the prosecutor (MALAGA v. U. S., 1 Cir., 57 F. (2d) 822, 826).

The gravity of the error here involved is stressed in SCREWS v. U. S., 325 U.S. 91, 107:

> "And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial. Whatever the degree of guilt, those charged with a federal crime are entitled to be tried by the standards of guilt which Congress has prescribed."

This right is so fundamental and so respected as frequently to require reversal even in situations much less questionable than that here involved (U. S. v. PINCOURT, 3 Cir., 159 F. (2d) 917; SANDROFF v. U. S., 6 Cir., 158 F. (2d) 623, and MORRIS v. U. S., 9 Cir., 156 F. (2d) 525).

The Court below rests its decision on its own construction of Rule 30. JUDGE MCCORD, in effect holds that the enactment of the New Federal Rules of Criminal Procedure dispenses with the mandate that the Trial Judge in a Federal Court must fully instruct the jury as to the law. In so deciding the Court below brushed aside rights flowing to the defendant in a criminal case as far back as the Year Books venture.

The Court below in giving such sanction to Rule 30, stampedes the Due Process clause of the United States Constitution, and particularly the right to have the jury fully informed as to the offense. Thus, the substantial rights afforded

by the 5th Amendment, which has withstood the withering attack of some zealous prosecutors, is now swept under the bed by a procedural rule which failed to impress either MR. JUSTICE BLACK or MR. JUSTICE FRANKFURTER at the time this Court's approval was sought on these Criminal Rules (323 U.S. CLXXIV-CLXXV).

The foreword to such rules, p. XI, declares:

> "Said rules shall neither abridge, enlarge nor modify the substantive rights of any litigant."

Such substantial rights may not be so naively brushed aside because the intent of Congress, in this cause, deems it otherwise. (cf BAKER v. U. S., 8 Cir., 139 F. (2d) 721, 723; U. S. v. SHERWOOD, 312 U.S. 584, 589, 590; 47 COLUMBIA LAW REVIEW, pp. 175-176, remarks of the present Attorney General as to the right of a Defendant to have the jury fully charged.)

It is submitted that Rule 30 cannot be invoked against Petitioner, First, because the Trial Court did not charge the jury on any of the statutory essential ingredients of the crime; hence, there was nothing to which Petitioner could except, since the Court did not fulfill its duty. Secondly, Petitioner's Motion to Dismiss the Information should have been sustained and the Court should have withheld from the jury every fact issue in this cause. The most that can be said is that after the Trial Judge made his ruling, all counsel agreed that it was proper procedure for the Court to advise the jury as to its ruling in this cause. This, of course, is far from constituting acceptance by Petitioner of the charges given. The Motion to postpone arraignment (R. 12-14); Motion for Bill of Particulars (14-16); Motion to Dismiss (R. 16-18); and Application to file in Court of Emergency Appeals to test the constitutionality of the Statute (R. 19-21) were as much

alive when the charge was given by the Court, as when presented. Petitioner never wavered in his position that the act was unconstitutional and that the Information should be dismissed. This was again brought to the Court's attention at the close of the Government's testimony by a Motion for Judgment of Acquittal (R. 205) and again at the close of all of the testimony (R. 210). In his Motion for a New Trial, Petitioner again urged these same matters (R. 27).

Under the circumstances the Court should have fully instructed the jury as to "good faith" and as to the other essential ingredients of the crimes charged (U. S. v. BALLARD, 322 U. S. 78). Since the intent with which Petitioner acted is not only material, but a controlling factor, and was a question for the jury (LAWLOR v. LOEWE, 2nd Cir., 187 F. 522; SILVERSTEIN v. LOCAL, ETC., 8 Cir., 284 F. 833), failure on the part of the Court to give instructions to the jury, even in the absence of a request or an exception, constituted in this cause, prejudicial error.

Where a Trial Court fully instructs a jury as to the law in a given case, but in so doing mistakenly advises them in some particulars, it would be necessary for counsel to give the Court an opportunity to correct itself before assigning the same as error on appeal. That, we submit, is the true meaning and purpose of Rule 30. It cannot apply to the situation as presented in this case (CAVE v. U. S., 3 Cir. (Feb. 1947), 159 F. (2d) 464).

POINT II

(a) The conduct of the Trial Court operated to deprive Petitioner of a fair trial and of the presumption of innocence.

(b) The improper conduct of the Prosecuting At-

torney clearly violated the right of Petitioner to a fair and impartial trial.

Argument

It is well recognized that proper conduct of the Trial Judge is necessary to preserve the accused's right to a fair trial. In this cause, the record is replete with instances of unfair tactics and misconduct on the part of the Trial Judge, as well as failure on the part of the Prosecuting Attorney to secure conviction by legitimate methods, so grossly prejudicial to the rights of this Petitioner as to make a new trial imperative in order to preserve even the form of a fair trial. A few instances should suffice.

I.

On *September 23rd, 1946,* Petitioner was indicted by the Grand Jury, District Court of the United States, Southern District of Texas, Houston Division. The record is silent as to when he was served and apprehended.

This Counsel was engaged on *October 5th, 1946.* On *October 7th, 1946,* Petitioner filed a Motion to dismiss such indictment (R. 6-8). This Motion was sustained on *October 8th, 1946* (R. 8). On *October 9th, 1946,* Information was filed setting up the same facts with the additional word "willfully" (R. 9-11). The Court insisted that Petitioner be immediately arraigned upon being served with the Criminal Information on *October 9th, 1946.* On *October 9th, 1946,* at 1:38 P. M., Petitioner filed his Motion to postpone arraignment for a period of ten days for the sole purpose of determining the genesis of this prosecution and to determine in an orderly manner the basis upon which the Grand Jury returned said indictment (R. 12-14). When counsel presented this Motion to the Judge, the Court inquired of one of the

many lawyers sitting as spectators in the court room as to his views on such Motion (R. 36-37). At 1:39 P. M., Petitioner presented a Motion to Dismiss the Criminal Information which was overruled (R. 16-18). At 1:40 P. M., Petitioner presented his Motion for Bill of Particulars which was promptly overruled (R. 14-16).

Thereupon, Petitioner presented an Application to File a Statutory Contest in the Court of Emergency Appeals for the purpose of determining the validity of the statute under which Petitioner stood charged. This was overruled (R. 19-21). At 2:12 P. M., the same day, Petitioner's counsel was handed a copy of the jury list, and the Court ordered this cause to proceed to trial (R. 48). When counsel was handed the jury list, he sought merely to have the record reflect, and nothing more, the exact time he was handed the copy of the jury list. At that point the Judge raised his voice in a manner which, of course, the voiceless pages of this Record cannot actually reflect nor depict, but in a manner to prejudice the rights of this Petitioner, at his counsel, in the full presence of a jury, and directed counsel in a menacing manner to sit down (R. 47-48), although counsel but stood up to make known in the Record that it was *2:12 p. m., October 9th, 1946,* when he received a copy of the jury list and that it took the Court exactly *thirty-four minutes* in which to dispose of four motions; the content of which, we respectfully submit, no Court could adequately consider in that period of time (U. S. v. THOMPSON, 2 Cir., 144 F. (2d) 604, 608; 23 Alper, 2 Cir., 156 F. (2d) 222, 226; Rule 6(e) FEDERAL RULES OF CRIMINAL PROCEDURE). The period for which arraignment was sought to be postponed was definitely a reasonable length of time, *to-wit: ten days.*

Whether any of these Motions should have been sustained is immaterial. The law presupposes that such motions shall be judicially and impartially considered in open court, and with-

out the aid or the views of some attorney spectator sitting in the Court room.

The Fifth Amendment to the constitution provides that "No person shall " * * * be deprived of life, liberty or property, without due process of law * * * ." Is it not a vain thing to give Petitioner his day in Court, and at the same time refuse him an opportunity to prepare his defense? If due credence is to be given such cases as AVERY v. STATE OF ALABAMA, 308 U.S. 444, and numerous others of like import, than the conduct recited herein constitutes complete denial of Petitioner's constitutional right to a fair and impartial trial (cf. EX PARTE HEJDA (Tex.), 13 S.W. (2d) 57).

Even if the facts of guilt were of record and not subject to dispute there still would be no excuse for not giving Petitioner time to prepare his case (COOKE v. U. S., 267 U.S. 517), and denying him the right to the substance of a fair trial.

All objections to evidence offered by the Government were promptly overruled and the Court's language and attitude R. 47-48) would seem to be neither understandable nor excusable. As JUSTICE DENMAN in BALLARD v. U. S., 9 Cir., 152 F. (2d) 941, 945, puts it:

> " * * * Though understandable and perhaps in individual instances excusable, it is not commendable conduct within the concepts of the factory, the forecastle or Lord Chesterfield's drawing room."

Subsequent to conviction, Petitioner presented a Motion for New Trial (R. 28-29) which was overruled immediately in the presence of counsel. Although the Government contended throughout this proceeding that this offense was a misdemeanor, bail bond was ordered and set by the Trial Court at *$3,000.00* which Petitioner ultimately secured.

While this case was pending in the United States Circuit

Court of Appeals at New Orleans, during the month of February, 1947, and at a time when the Trial Court no longer had jurisdiction over this cause, upon suggestion of the Prosecuting Attorney, there was caused to be issued and filed upon Petitioner a Capais Pro Fine Writ providing for his imprisonment unless he paid $2,000.00 cash, into the registry of the Trial Court, or post a satisfactory surety bond in lieu thereof; failure to furnish either resulting in further imprisonment.

Thereupon, Petitioner filed a Writ of Habeas Corpus and a hearing was had in the Chambers of United States Circuit JUSTICE J. C. HUTCHESON, JR., on February 26th, 1947. At that time the matter was fully explored by the named Justice; arguments were presented by the Government as well as Petitioner. At the conclusion thereof said Justice discharged Petitioner from custody since the record disclosed that he had previously presented and had approved a *$3,000.00 bond and the sentence thereby stayed.* These records are possibly not appended to the record now in possession of the Clerk of this Court. However, they are part of the record in this cause and are lodged in the office of the Clerk of the Circuit Court of Appeals at New Orleans, La.

It is respectfully urged that no Court could fairly and properly evaluate the merit of the motions presented by Petitioner *within the period of 34 minutes* from the time the first motion was presented. And it seems impossible to conceive that Petitioner was *not* denied his constitutional right to a fair trial when he was forced to an immediate trial *on the same day* that he was served with the charges in this case. It is submitted that the gain in speed and economy of a trial under such circumstances is offset by the disadvantages at which Petitioner is placed. The trial court has the definite obligation of safeguarding the rights not only of the Government, but of this Petitioner and must see to it that his rights are not jeopardized by improper tactics and misconduct

shown herein. " * * * The Court should be impartial between the Government and the Defendant * * * " (REAGAN v. UNITED STATES, 157 U.S. 301).

Since the Trial Judge " * * * has special responsibilities for assuring fair trials of those accused of crime." (BIHN v. U. S., 328 U.S. 633, 637), and since this record demonstrates clearly a " * * * principle of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental." (SNYDER v. MASSACHUSETTS, 291 U.S. 97, 99) has been violated, the proper corrective should be applied.

Not content with having secured conviction, the prosecuting attorney in his brief in the Court below (p. 5) made the following written statement which was neither in the record nor part of this proceeding:

> "This becomes especially obvious when it is recalled that Appellant had been convicted on a prior occasion for violations of the same Regulation Maximum Price Regulation No. 540, and still had never questioned the validity of said Regulation."

This was called to the attention of the Court below. Perhaps the insertion of this improper matter in the Government's brief had little or no effect upon the Court's decision. Yet, it seems to us that it would be a parody on justice to hold that, although a trial judge and a Prosecuting Attorney engage in improper conduct, the error is cured because the Circuit Court feels that the misconduct was not understood by, or affected, in the least, the jury's verdict. Isn't that really stepping outside Appellate duties and assuming the obligations of a jury?

Whether the jury was affected by the conduct recited herein, or understood exactly what took place, has no bearing on the issue as to whether Petitioner was denied Due Process

because the record displays that " * * * the judge was exhibiting a prosecutor's zeal, inconsistent with that detachment and aloofness which courts have again and again demanded, particularly in criminal trials. * * * Prosecuting and judgment are two quite separate functions in the administration of justice; they must not merge." (JUSTICE LEARNED HAND in U. S. v. MARZANO, 2 Cir., 149 F. (2d) 923, 926.)

None but the neophyte would suggest that counsel under such circumstances should tangle with the trial judge. Experience in trial and appellate courts dictates that frequently a logomachic contest with a trial judge means probable reprisals should the judge's displeasure be incurred, and this no serious-minded trial lawyer would do at the risk of hastening his client's march to the penitentiary.

A sober view of this record discloses that an egregious wrong has been committed against Petitioner.

As has been said over and over again, "In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law." (QUERCIA v. U. S., 289 U.S. 466, 469.)

We respectfully suggest that the constitutional rights of Petitioner—particularly the right of a fair and impartial trial—do not hang on such exceedingly tenuous strands as obtaining the views of a lawyer spectator on a matter affecting the liberty of this Petitioner (R. 36-37). And such right may not be discarded or frittered away simply because the trial judge may not be feeling very well, and, as a result thereof "not as keen as I ought to be, * * * " (R. 37).

If the proper dispensation of constitutional rights in the United States District Courts is dependent solely upon the physical condition of the judge, then the admonition recently urged by that sturdy and courageous Circuit Justice

(LEARNED HAND) in U. S. v. DI RIE, 2 Cir., 159 F. (2d) 818, 820, is meaningless:

> "If the prosecution of crime is to be conducted with so little regard for that protection which centuries of English law have given to the individual, we are indeed at the dawn of a new era; and much that we have deemed vital to our liberties, is a delusion."

POINT III

The evidence in this case fails utterly to show Petitioner "guilty" as charged.

Argument

Just a short time ago, this Court stated through MR. JUSTICE JACKSON (FAY v. PEOPLE OF STATE OF NEW YORK, 67 Sup. Ct. 1613, 1628), that "A verdict on the evidence, however, is all an accused can claim; he is not entitled to a set-up that will give a chance of escape after he is properly proven guilty. Society also has a right to a fair trial."

In this cause, there is no evidence that Petitioner sold the motor vehicles alleged in the Criminal Information. It has already been pointed out that the variance between the allegations and the proof offered by the Government is such that it cannot be said that the Government has established every element of the crime to a moral certainty and beyond a reasonable doubt (COFFIN v. U. S., 156 U.S., 732; COCHRAN v. U. S., 157 U.S. 286; KIRBY v. U. S., 147 U.S. 47).

As previously stated, Petitioner moved for a verdict of ACQUITTAL because there was no evidence of guilt at the conclusion of the Government's evidence, and again at the close of all of the testimony.

This Point was brought forward in his Motion for a New Trial and fully developed in the Court below.

A mere glance at the Record in this respect shows no basis for this conviction.

Conclusion

It is respectfully submitted that the Writ of Certiorari prayed for in the Petition should issue.

Respectfully submitted,

BERNARD A. GOLDING,
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Houston, Texas,
Counsel for Petitioner

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 241

W. W. WATTS, *Petitioner,*

v.

THE UNITED STATES OF AMERICA, *Respondent*

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

---

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

A.

On pp. 11-12 of its brief, the United States concedes "* * * that the proof did not relate to the same automobiles as were charged in the information * * * " Hence, this conviction does *not* rest upon the conditions and standards authorized by Congress. And too, the presumption of innocence

in favor of Petitioner until proven otherwise by legal evidence is now disregarded.

On pp. 2-3, the Government quotes the applicable statute establishing that "good faith" and the definition of "used cars" are essential elements of the offense.

The Government does not question that these issues were *not* submitted to the jury. It does *not* dispute that there was no proof offered on either issue by the Government.

Although Congress has fixed by this statute the basis upon which legal conviction may obtain in this cause, and although this Court has sanctioned such conditions (M. KRAUS & BROS. v. U. S., 327 U.S. 614), the United States in its brief (p. 9) asserts, mistakenly we believe, that "good faith" " * * * has no relation to this cause * * * " but cites no authority, and cannot cite any, to support such conclusion. The case of HORSLEY v. U. S. (5 Cir.), 160 F. (2d) 43, is one in point, and contrary to the position taken by the Government in this regard.

The cases adverted to on p. 9, do not treat the issue of "good faith" and the definition of "used cars." Such cases relate solely to the term "willful." Since no point has been made as to the definition given in this respect, the cited cases import no relevancy.

On p. 10, the Government cites UNITED STATES v. BAYER, 67 S. Ct. 1394, 1396, as authority to justify failure of the trial judge to charge the jury in this cause upon the essential elements (cf. U. S. v. AUSMEIER, (2 Cir.), 152 F. (2d) 349, 358). The holding in the BAYER case, " * * * that the trial court was within its area of discretion in its brevity," is *not* applicable to the case at bar because, as pointed out by MR. JUSTICE JACKSON in UNITED STATES v. BAYER, 67 S. Ct. at p. 1396, the trial judge in that case had " * * * made an accurate and correct charge, * * * " and "the extent of its amplification must rest largely in his discretion. The trial

judge in the light of the whole trial and with the jury before him may feel that to repeat the same would make them no more clear, and to indulge in variations of statement might well confuse." Here, the issue of "good faith," the definition of "used car," as well as every hint of the applicable law and the elements of the crime charged, were withheld from the jury by the trial judge.

Moreover, it is notable that the Government does *not* contest the apparent conflict between the decision in this case and those of this Court and of the several Circuit Courts (Pet. 13-16).

B.

On p. 10, attorneys for the Government seek to apply to this cause the rule of JOHNSON v. U. S., 318 U.S. 189, 201, to the effect that a defendant may not assume one course during the trial and repudiate it on appeal. Government counsel's mistake and inadvertance in this regard is likely due to the fact none of them participated in the trial in the District Court.

Petitioner argued and contended throughout via *Motion to Dismiss* (R. 16-18), *Application to file in the Court of Emergency Appeals* (R. 19-21), *Motions for Acquittal* (R. 205-210, 243), and *Motion for New Trial* (R. 27-29), that the information should have been *dismissed* since none of it was good. Further, by *Motion for New Trial,* it was brought to the attention of the trial judge the utter failure to properly charge constituted prejudicial error and was irremediable. The cold record (MORTENSON v. U. S., 322 U.S. 369 374—Syllabus 6) shows conclusively that Petitioner never deviated from the position stated in said *Motion.* He also advanced the *alternative* argument that "good faith" and the definition of "used cars" should have been submitted to the jury. In the circumstances, JOHNSON v. U. S., supra, has no application

to the instant cause (UNITED STATES v. BALLARD, 322 U.S. 78, 82-85).

On pp. 9-10, the United States in attempting to justify failure to state correctly the *crucial* issues to the jury in this cause, declares: "Since the offense was a *simple one* (italics supplied), the charge could properly be succinct." We concede that Petitioner is an unimportant person, but our laws were made for the unimportant as well as the important persons (HOMMA v. PATTERSON, 327 U.S. 759, 760). We can find no better reply to this rather unusual assertion than that contained in DAVIS v. U. S., 328 U.S. 582, 597 (MR. JUSTICE FRANKFURTER): "It is easy to make light of insistence on scrupulous regard for the safeguards of civil liberties when invoked on behalf of the unworthy. It is too easy. History bears testimony that by such disregard are the rights of liberty extinguished, heedlessly at first, then stealthily, and brazenly in the end."

C.

Finally, it is noteworthy that the Government does *not* challenge Petitioner's claim that the proceedings in the trial court were embalmed with an atmosphere of hostility as to deny him the substance of a fair trial, in violation of the Fifth Amendment.

Respectfully submitted,

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Counsel for Petitioner.

It does not seem out of place to here quote a recent and fitting statement from Judge Hutcheson in Thomas v. U. S., 162 F. (2) 301, 304:
"The hard won safeguards of human liberty, enshrined in protective rules of the kind violated here, ought not to be done lip service to be recognising their breaches but holding them harmless."

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758095—47

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 241

W. W. WATTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 256–261) is reported at 161 F. 2d 511.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 13, 1947 (R. 261). A petition for rehearing was denied June 13, 1947 (R. 265). On July 7, 1947, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to August 6, 1947 (R. 266). The petition for a writ of certiorari was filed on August 2, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended

by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the judge's charge, in which petitioner acquiesced at the trial, adequately instructed the jury on the elements of the offense.

2. Whether petitioner was denied a fair trial because the judge ruled on certain preliminary motions immediately after hearing argument thereon.

3. Whether the evidence is sufficient to support the verdict.

STATUTES AND REGULATIONS INVOLVED

The Emergency Price Control Act of 1942, as amended, 56 Stat. 23, 58 Stat. 632, 59 Stat. 306, 60 Stat. 664 (50 U. S. C. App., Supp. V, Section 901, *et seq.*) provides in pertinent part:

> SEC. 2. (a) Whenever in the judgment of the Price Administrator * * * the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and effectuate the purposes of this Act.
>
> SEC. 4. (a) It shall be unlawful * * * for any person to sell or deliver any commodity, * * * in violation of any regulation or order under section 2 * * *.
>
> SEC. 205. (b) Any person who willfully

violates any provision of section 4 of this Act * * * shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) [relating to the disclosure or use for personal benefit of official information by government officers] and for not more than one year in all other cases, or to both such fine and imprisonment. * * *

(d) No person shall be held liable for damages or penalties in any Federal, State, or Territorial court, on any grounds for or in respect of anything done or omitted to be done in good faith pursuant to any provision of this Act or any regulation, order, price schedule, requirement, or agreement thereunder, or under any price schedule of the Administrator of the Office of Price Administration or of the Administrator of the Office of Price Administration and Civilian Supply, notwithstanding that subsequently such provision, regulation, order, price schedule, requirement, or agreement may be modified, rescinded, or determined to be invalid. * * *

Maximum Price Regulation 540 issued June 10, 1944 (9 Fed. Reg. 6434), as amended, provides in part:

§ 1 (a) [as amended January 14, 1946, 11 Fed. Reg. 491] * * * (1) *Definition of used passenger automobile* (*"used car"*).

"Used passenger automobile" (called "used car" in this regulation) means any passenger automobile having a seating capacity of less than eleven persons which has been used for any purpose and the chassis or body of such an automobile * * *.

§ 2 [as amended September 6, 1945, 10 Fed. Reg. 11556] *Prohibition against dealing in used cars at prices above the maximum.* (a) On and after July 10, 1944, regardless of any contract or other obligation, except as provided in paragraphs (b), (c) and (d).

(1) No person shall sell or deliver any used car at a price higher than the maximum price permitted by this regulation except as provided in paragraph (d) * * * [relating to repossession of financed cars after default].

STATEMENT

On September 26, 1946, an indictment in three counts was returned against petitioner in the United States District Court for the Southern District of Texas, charging violations of the Emergency Price Control Act and the 1946 extension thereof, and Maximum Price Regulation 540 issued pursuant thereto, by the sales of three automobiles at above ceiling prices (R. 3–5). On October 7, 1946, petitioner moved to dismiss the indictment on the ground, *inter alia,* that it failed to allege that the overcharges were willful (R. 6–8). The motion was granted on October 8 (R. 8). On October 9, the United States At-

torney filed an information which repeated the charges of the indictment with the addition of the word "willful," and added a fourth count charging another offense (R. 9–11). On the afternoon of that day, petitioner moved to postpone arraignment for ten days, pointing out that the fourth count contained a new charge, and also alleging that he believed the indictment had been returned under conditions disclosing disqualification of some grand jurors, and that such disqualifications would vitiate the information as well (R. 12–14). When the court stated that it thought the motion should be granted because of the new charge in the fourth count, the United States Attorney moved to dismiss that count, and the motion was granted (R. 33, 40–41). Petitioner also sought a bill of particulars (R. 14–16), moved to dismiss the information on the ground that it was merely an amendment of an indictment and that it was too vague and indefinite (R. 15–16), and applied for leave to file in the Emergency Court of Appeals a complaint attacking the constitutionality of the Emergency Price Control Act and the 1946 extension (R. 20–21). The motions were denied (R. 16–18, 21), and the case proceeded to trial. Petitioner was acquitted on the first count and convicted on the second and third counts (R. 22–23). A motion for a new trial was denied (R. 27–29), and petitioner was sentenced to imprisonment for one year and to

pay a fine of $1,000 on each count, the prison sentences to run concurrently (R. 24–26). The Circuit Court of Appeals for the Fifth Circuit affirmed (R. 256–261).

The evidence for the Government on the second and third counts may be summarized as follows:

On August 5, 1946, Charles T. Jackson, Jr., purchased a 1939 Chevrolet Tudor Town Sedan for $995, making a down payment of $560 (R. 61, 110). Jackson first made arrangements for the purchase with a salesman at petitioner's used car lot (R. 62, 108–109). When Jackson was about to make the down payment, petitioner came into the office and said that he could not accept a check for $560, but would take a check for $245 and the balance in cash (R. 62–63, 110). Jackson, who was accompanied by his father and mother, then said that he would make the entire down payment in cash (R. 63–64, 110). Jackson and his parents went to their bank, and Jackson drew out $500 in cash, and his mother drew out $60 (R. 64–66, 129). They then returned to petitioner's lot and paid $560 in cash to petitioner (R. 66, 111). Petitioner gave Jackson a receipt which listed the price of the car as $680 plus $15 for license and taxes, and showed a down payment of $245, leaving $450 to be financed (R. 66, Gov. Ex. 2, R. 68). The salesman had told Jackson that he would fix the lights, horn and speedometer

which were not in working order at the time Jackson tried out the car, but neither the salesman nor petitoner gave Jackson a written or oral warranty for 30 days after the sale or for the first thousand miles (R. 71–73, 111–112). About a week after the purchase, when Jackson and his father brought the car around to have the horn and speedometer fixed, Jackson's father called petitioner's attention to the discrepancy of $315 between the amount listed as the down payment in the invoice and the actual amount paid, pointing out that Jackson, who intended to use the car for business purposes, would be obliged to pay an income tax on that $315. Petitioner agreed to repay Jackson 10 percent of the amount toward the income tax liability, and gave him a check for $31.50 (R. 102–103, 112–113). The ceiling price on a Chevrolet 1939 Tudor Town Sedan sold on August 5, 1946, without warranty was $543.83 (R. 134, 136–137).

W. L. Lybarger purchased a 1940 six-cylinder four-door "deluxe" Pontiac from petitioner on August 10, 1946, for $960. The ceiling price for such a car at that time was $816.83 (R. 168). Lybarger turned in a 1936 Ford Tudor for which he received an allowance of $350; the balance of $610 was financed (R. 141–147, 166). He received no written or oral warranty from either petitioner or petitioner's salesman (R. 148). Petitioner stated that he would not give any

guaranty on the car because he was selling it for a friend (R. 148–149). Two days after he purchased the automobile, Lybarger paid $41.20 for repairs (R. 148).

In his charge, the judge stated that there were three elements which the jury had to find beyond a reasonable doubt in order to convict on each of the counts—first, that petitioner sold the automobile in question; second, that he sold it at a price above ceiling; and third, that he sold it above ceiling willfully (R. 246). The judge defined "willful" as "that which is intentional, or knowing, or voluntary, as distinguished from accidental. In other words, it is something knowingly done, or intentionally done, or voluntarily done" (R. 248).

After completing his charge, the judge asked if there were any objections or suggestions, and the counsel for both sides said that there were none (R. 248).

ARGUMENT

1. Petitioner's principal contention (Pet. 11, 13–16, 18–19, 20–26) is that the judge failed adequately to instruct the jury on the elements of the offense in that he did not tell them that petitioner could not be found guilty unless they found that his acts were not performed in good faith. Petitioner argues that he was entitled to such an instruction under Section 205 (d) of the Emergency Price Control Act (*supra*, p. 3),

which provides that no one shall be subject to penalties for acts performed in good faith under a regulation, even though such regulation may subsequently be declared invalid. But that provision has no relation to this case, since petitioner did not claim that he acted in good faith under a regulation later found invalid.

The statute does provide in Section 205 (b) that only "willful" violations of a regulation shall be subject to criminal prosecution. As set forth in the Statement, the judge specifically instructed the jury to such effect, and then went on to define "willful" as being deliberate and intentional as against accidental or inadvertent. This satisfies the requirements of Section 205 (b). *Kempe* v. *United States,* 151 F. 2d 680, 688 (C. C. A. 8); *Zimberg* v. *United State,* 142 F. 2d 132, 137 (C. C. A. 1), certiorari denied, 323 U. S. 712; *Gomila* v. *United States,* 159 F. 2d 1006, 1009 (C. C. A. 6), certiorari denied June 2, 1947, No. 1282, O. T. 1946. The judge also described the charge, defined the elements of the offense, gave the jury instructions on the presumption of innocence and the necessity of finding guilt beyond a reasonable doubt, and explained reasonable doubt (R. 244–246). The court below held that the charge did "fairly cover the vital and essential elements of the case" (R. 259), even though it was not "as detailed or explanatory as might have been desirable" (*ibid.*). Since the

offense was a simple one, the charge could properly be succinct. As this Court said of the charge in *United States* v. *Bayer*, decided June 9, 1947, No. 606, O. T. 1946, "the trial court was within its area of discretion in his brevity."

Since, therefore, the charge covered all the essential elements of the offense, it would not have been subject to attack, even if petitioner had objected thereto at the trial. *A fortiori*, his specific acquiescence in the charge when asked for suggestions by the trial judge, clearly bars him from attacking it now. Rule 30, F. R. Crim. P.; *Johnson* v. *United States*, 318 U. S. 189, 199–201.[1]

2. Petitioner's contention that he was denied a fair trial because of the denial of his motion to postpone arraignment and because the court disposed of his preliminary motions in short order (Pet. 11, 19, 27–33) is without substance. As has been stated, the judge indicated that he would grant the motion for postponement if the United States attorney intended to try the fourth count alleging a new charge, and he did not allow the

[1] Petitioner argues (Pet. 23) that the charge was also defective in failing to instruct the jury that they must find that the cars sold had been driven a thousand miles or more since such was the definition of used cars in M. P. R. 540. However, the definition which petitioner cites (Pet. 10, 12), was not the one in force at the time the offenses were committed. The definition was changed by amendment 12, effective January 14, 1946, 11 Fed. Reg. 491, to read as cited, *supra*, p. 4.

case to proceed to trial until the fourth count had been dismissed. Petitioner's other motions—to postpone arraignment pending investigation of unknown irregularities by the grand jurors in returning the dismissed indictment as a basis for attack on the information filed by the United States Attorney, and to stay the trial pending a general attack on the unconstitutionality of the Emergency Price Control Act,—were argued at some length before the court ruled thereon (R. 35–39, 43–47). The motions were clearly without merit and were given as much attention as they deserved.[2]

3. Petitioner's attack on the sufficiency of the evidence to support his conviction (Pet. 8–9, 12, 19, 33–34) is refuted by the facts set forth in the Statement, *supra*. The only specific defect in the evidence to which petitioner points is his contention that the proof did not relate to the same automobiles as were charged in the information in that the proof showed the sale to Jackson of a 1939 Chevrolet Tudor Town Sedan, whereas the information charged the sale of a 1939 Chevrolet Town automobile, and the proof showed the sale to Lybarger of a 1940 six-cylinder four-door deluxe Pontiac (R. 143), whereas the information charged the sale of a 1940 Pontiac four-door

[2] Petitioner's objection to the United States Attorney's reference in his brief in the circuit court of appeals to a prior conviction of petitioner (Pet. 31) obviously has no relevance to the validity of petitioner's trial.

automobile (Pet. 8–9). The insubstantiality of this argument need not be pressed further.

CONCLUSION

We respectfully submit that the petition for a writ of certiorari should be denied.

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